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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 172

WALTER W. JOHNSON COMPANY,
Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,
Respondent.

Reply Brief for Petitioner

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TABLE OF AUTHORITIES CITED

Cases	Pages
Begnaud v. White, 170 F.(2) 323	3, 5
Branch Banking & Trust Co. v. United States, 98 Fed. Supp. 757 (Ct. Cl. 1951)	3
Dayton Airplane Co. v. U. S., 21 F.(2d) 673 (C.C.A. 6th, 1927)	3
Falcon, The, 19 F.2d 1009 (D.C. Md. 1927)	3
Korman v. FHA, 113 F.(2) 743 (C.A.D.C., 1948)	2
Miller v. Lykes Bros.—Ripley S.S. Co., Inc., 98 F.(2d) 185 (C.C.A. 5, 1938)	2
Sartor v. Arkansas Gas Corp., 321 U.S. 620	5
United States v. Denver and RGW R. Co., 16 Fed. (2d) 374 (C.C.A. 8, 1926)	3

Rules	
Federal Rule 56(c)	5

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Respondent bases its brief in opposition upon two principal grounds, viz:

(a) Petitioner's claims are against the United States and, therefore the doctrine of waiver of the statute of limitations with respect to the first two clauses of counterclaim does not apply;

(b) The third and fourth clauses of counterclaim, relating to unjust enrichment and imposition of a constructive trust, are clearly "without foundation on the merits."

These contentions will be taken up in order.

1. By asserting that the doctrine of waiver of the statute of limitations cannot be applied to RFC, respondent has obviously sought to avoid any consideration of the many genuine issues of fact with respect to that question which exist in this case. No effort has been made to explain away the genuine issues of fact respecting waiver of statute of limitations which petitioner could only incompletely point out on pages 12-15 of its petition but which are readily ascertainable from even a cursory reading of the deposition of Mr. Walter W. Johnson (R. 282-425), the Answers to Requests for Admissions (R. 168-172), the Answers to Interrogatories (R. 114-124), and the Affidavits of Walter W. Johnson (R. 211-220) and DeLancey C. Smith (R. 236-240).

This attempt to identify RFC with the United States is fruitless at this stage of the case. Raising questions as to the authority of various RFC agents to "waive" limitations merely raises another issue of fact—a question which RFC has the burden of dispelling inasmuch as the authority of RFC's agents is a matter solely within the knowledge of RFC. *Miller v. Lykes Bros.—Ripley S.S. Co., Inc.*, 98 F.(2d) 185 (C.C.A. 5, 1938). Aside from this question of actual authority, however, petitioner contends that RFC is subject to customary rules of equitable estoppel to plead limitations. No doubt RFC would like to assume the full privileges of the sovereign, however in *Korman v. FHA*, 113 F.(2) 743 (C.A.D.C., 1948), one of the cases cited by respondent (Br. 5), it was held that government corporations had no better rights against the assets of a bankrupt than a private creditor and that such corporations did not have the preferred status of the United States.

No cases appear to settle the point but even if it is assumed for argument that RFC has the privileges of the United States regarding limitations, it is clear that the United States may be estopped if an appropriate factual showing is made.

United States v. Denver and RGW R. Co., 16 Fed. (2d) 374 (C.C.A. 8, 1926);

Dayton Airplane Co. v. U. S., 21 F.(2d) 673 (C.C.A. 6th, 1927);

Branch Banking & Trust Co. v. United States, 98 Fed. Supp. 757 (Ct. Cl. 1951);

The Falcon, 19 F.2d 1009 (D.C. Md. 1927).

In these circumstances, it is obvious that the possible estoppel of RFC to plead limitations is a material fact in this case and one upon which petitioner has raised genuine issues (See Pet. pp. 12-15). These issues were not mentioned once in any of the opinions below. Instead, the District Court disposed of the case by admittedly considering only the contract documents and the Agreed Statement of Facts—documents in which these issues did not appear (137 F. Supp. 860, R. 251). This plain error which was approved by the Court of Appeals for the Ninth Circuit in affirming the summary judgment where issues of fact exist regarding limitations conflicts directly with *Begnaud v. White*, 170 F. (2) 323 decided by the Court of Appeals for the Sixth Circuit in 1948, and requires the issuance of a writ of certiorari by this Court to resolve the conflict between the Circuits.

2. Petitioner asserts that RFC was unjustly enriched because it appropriated the assets and earnings of Tuolumne Gold Dredging Corporation for repayment of its own loans while petitioner remained unpaid for constructing the one asset that made Tuolumne able to pay any of its debts at all.

Respondent asserts that repayments to it out of the earnings of Tuolumne were strictly in accordance with the Indenture and Chattel Mortgage, by the terms of which petitioner had bound itself to abide (Br. 6). This is not an accurate statement. RFC had complete control of disbursements of the loan proceeds by means of its control of the Construction Fund into which the loan funds were advanced to Tuolumne (R. 38-9). RFC also had complete control of the Trust Fund into which all of Tuolumne's gross income was paid and from which all of Tuolumne expenses which were not to be satisfied from the Construction Fund were to be paid (R. 47-50). RFC had assured petitioner that it would be paid its construction price for the dredge from the Construction Fund. After the dredge was completed, RFC again represented to petitioner that the remaining moneys in the Construction Fund would be held intact to meet petitioner's claims. In reliance upon this position of RFC, petitioner had initially waived the prior lien which it would normally reserve in the gold dredge, thereby enabling RFC to secure a legal first lien on the property.

In these circumstances, it was plainly unjust for RFC to receive the benefit of its first lien upon the dredge and also to repay itself for a subsequent loan to Tuolumne of $120,000.00 from Tuolumne earnings while petitioner remained unpaid for constructing the gold dredge. These factors were completely ignored by the courts below. The case as "it stood upon the pleadings and admitted facts", as counsel for respondent has stated (Br. 7), may have been the basis of decision below, but the point is that that was *not* the entire case. There were other facts not admitted. Both the District Court and Court of Appeals ignored important factual material which was contained in the deposition of Mr. Walter W. Johnson, Answers to Requests to Admissions, Answers

to Interrogatories and numerous affidavits on file on behalf of petitioner herein.

In other words, both courts below purported to determine the validity of these two causes of counterclaim "on the merits" without considering all matters in the file on the motion for summary judgment. As petitioner has continuously pointed out, it did not have the burden upon a motion for summary judgment to establish its claim "on the merits." Petitioner had only to demonstrate that a genuine issue of material fact existed. It will be clear that many such issues exist if this Court will review the record as a whole, rather than only a portion of it.

3. This petition does not represent a case where a litigant is asking this Court to adopt its version of a factual situation after a trial or its interpretation of the law after a full hearing below. Petitioner is only requesting that this Court grant to it a hearing upon the full record, limited though it is, for petitioner knows that such a review will clearly demonstrate many issues of material fact which require a full trial on the merits. The case as it now stands not only clearly conflicts with *Begnaud v. White,* supra, and with decisions of this Court pointing out the proper factors for consideration on motion for summary judgment (cf. *Sartor v. Arkansas Gas Corp.,* 321 U.S. 620), but also with the plain requirements of Federal Rule 56(c). It represents such a violent departure from the customary manner of deciding a motion for summary judgment as to call for exercise of this Court's discretion and power of supervision.

CONCLUSION

For the foregoing reasons, it is respectively submitted that the petition for a writ of certiorari should be granted.

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